Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-703

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, *et al.*,
Respondents.

No. 83-1031

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

JOETTE LORION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS *AMICUS CURIAE*

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Pursuant to Rule 36.2 of the Rules of this Court, the Atomic Industrial Forum, Inc., ("the Forum") submits this brief as *amicus curiae* supporting the position of Florida Power & Light Company, the United States Nuclear Regulatory

Commission, and the United States of America. The Forum has received and filed with the Court the written consents of counsel for each of the parties to appear as *amicus curiae* in this proceeding.

INTEREST OF THE AMICUS CURIAE

The Forum is an association of about 500 domestic and overseas organizations interested in the development of peaceful uses of nuclear energy. Its members include electric utilities, manufacturers, architect-engineers, consulting firms, mining and milling companies, labor unions and others, who design, build, operate, and service facilities for the production of nuclear fuel and the generation of nuclear power. To authorize many of these activities, the Nuclear Regulatory Commission issues several types of licenses, including licenses to construct and operate power reactors, and licenses to possess and use special nuclear material, by-product material and source material. Petitioner, Florida Power & Light Company, is the holder of licenses from the Commission authorizing it to operate power reactors. It is also a member of the Forum. Other members of the Forum are the holders of licenses issued by the Commission. These holders of licenses which are members of the Forum are affected by the outcome of this case.

10 C.F.R. § 2.206 provides that any person may request that the Commission institute a proceeding to modify, suspend or revoke a license or to take other action as may be appropriate. When such a petition is filed, the affected license holder generally will comment in defense of its license. If the petition is granted, a trial-type hearing may be commenced pursuant to 10 C.F.R. § 2.202, in which the license holder will be a party. If the petition is denied and judicial review of the Commission action sought, the license holder will (as here) usually participate by intervening in the judicial proceeding.

Should the judgment of the Court of Appeals not be reversed, there could be four layers of review in connection with the denial by the NRC Staff of petitions filed under 10 C.F.R. § 2.206. The denial may be reviewed by the Commission itself, after which the losing party could seek review in the district courts, the courts of appeals and even the Supreme Court. This

will result in a material increase in the amount of litigation involving petitions filed under Section 2.206 and the district courts could become intimately involved in resolving highly complex technical matters. In addition, judicial review of other NRC decisions could be complicated as a result of uncertainty created by the decision of the Court of Appeals as to the proper federal court in which to seek judicial review. License holders would have no choice but to intervene and participate in this litigation as the real party in interest and in order to protect their licenses. Hence, the Forum, through its members holding NRC licenses, has a vital interest in seeing that the decision of the Court of Appeals is reversed.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition for a Writ of Certiorari filed by the Solicitor General [1] and in the Petition for a Writ of Certiorari filed by Florida Power & Light Company [2] set forth the facts in this case. The Forum will rely on those statements of the case. The single issue before the Court is whether the Court of Appeals was correct in holding that it lacked jurisdiction to review orders of the Nuclear Regulatory Commission denying petitions filed under 10 C.F.R. § 2.206.

SUMMARY OF THE ARGUMENT

When Congress enacted the Atomic Energy Act, it made a choice between judicial review in the courts of appeals and review in the district courts. It chose to have expert agency fact-finding and court of appeals review of the agency record. There are exceptions to court of appeals review. District courts have

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[1] Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit on behalf of the U.S. Nuclear Regulatory Commission and the United States ("Petition for Writ of Certiorari on Behalf of NRC") at 2-6, *U.S. Nuclear Regulatory Commission* v. *Lorion*, No. 83-1031 (Supreme Court).

[2] Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit on behalf of Florida Power & Light Company ("Petition for Writ of Certiorari on Behalf of FP&L") at 2-5, *Florida Power & Light Co.* v. *Lorion*, No. 83-703 (Supreme Court).

jurisdiction over certain clearly specified matters arising under the Atomic Energy Act. The instant matter is not among them. None of the matters committed to the district courts involves the review of any step in initial licensing, license suspension or revocation, or rulemaking actions taken by the Commission.

Congress also gave the Commission flexibility to mold its administrative process to the demands of its regulatory mission. The word "proceeding" in Section 2239(a) of the Act covers a variety of procedures ranging from those associated with trial-type hearings to informal notice and comment. Even when the Commission institutes a proceeding which could encompass a trial-type hearing, it may use screening devices to assure that such a hearing is not unnecessarily commenced. For example, a request for a trial-type hearing may be denied in a licensing proceeding if an individual seeks to raise issues which do not meet the threshold requirements for specificity and basis or do not constitute genuine disputes of material fact. Regardless of the exact type of proceeding, a disappointed party may obtain review of NRC actions in a broad range of proceedings in the courts of appeals.

The Court of Appeals nevertheless held that the denial of a petition filed pursuant to Section 2.206 did not constitute a "proceeding" within the meaning of Section 2239(a). It did so because, unlike proceedings set forth in Section 2239(a), a person may not demand a hearing before his petition is denied (which demand the Court of Appeals reasoned was the critical factor in assessing whether such a "proceeding" has commenced), and because such denials may not produce the type of formal record which is usually the predicate for judicial review in the courts of appeals. Neither of these reasons provide a basis for concluding that the denial of a petition filed under Section 2.206 is outside the class of "proceedings" delineated in Section 2239(a).

In view of the flexibility of the Commission to mold its administrative process and the intent of Congress that agency actions be reviewed in the courts of appeals, the Court of Appeals should have construed the word "proceeding" in Section 2239(a) broadly to include any step in a proceeding,

including the denial of a petition filed under Section 2.206. The result reached by the Court of Appeals would require the Commission to return to the Congress to clarify the application of Section 2239(b) every time the Commission fashioned a new proceeding like Section 2.206 within the broad scope (but not necessarily the explicit wording) of Section 2239(a). Denial of a petition filed under Section 2.206 is analogous to the denial of a hearing request when the individual seeking a hearing fails to raise a genuine dispute of material fact. In addition, the record generated by the Commission when it denies a petition filed pursuant to Section 2.206 is in most cases sufficiently developed to allow meaningful review. In fact, it is often comparable to the record generated in a licensing or rulemaking proceeding within the meaning of Section 2239(a) in which notice and comment is solicited. Further, should the record be inadequate for review in a particular case, the matter can be remanded to the Commission.

The decision of the Court of Appeals should also be reversed because it results in duplicative, fragmented and unnecessarily complex judicial review of Commission actions. Under the Court of Appeals decision, review of the denial of a petition filed pursuant to Section 2.206 could be before the Commission itself, the district courts, the courts of appeals and the Supreme Court. Fragmented review of a Commission action relating to licensing could also be possible if, when granting a license, the Commission simultaneously denies a petition filed under Section 2.206 and in parallel completes trial-type hearings on the issuance of a license. Denial of the petition would be reviewed in the district courts while issuance of a license following the hearings would be reviewed in the courts of appeals. Finally, if the rationale of the Court of Appeals is extended to other Commission actions analogous to the denial of a petition filed under Section 2.206, such as the denial of a petition for rulemaking filed pursuant to 10 C.F.R. § 2.803, questions could be raised as to whether such action is reviewable in the district courts as suggested by the reasoning below or, as clearly intended by Congress, in the courts of appeals.

ARGUMENT

I. The Construction of Section 2239 by the Court of Appeals Fails to Account for the Overall Structure of the Hearing and Judicial Review Provisions of the Atomic Energy Act

The Court of Appeals characterized Section 2239 as an "unusual statute 'which defines a reviewable order with such limiting circumstantiality that a number of determinative agency actions cannot be possibly squared with the requirements.'"[3] It further observed, "Given this unusually self-contained statutory scheme, there is no room in which to import the well-founded presumption against bifurcation of judicial forums."[4] But Congress manifested no intention of limiting Section 2239(a) to only "formal" proceedings, thereby limiting review in the courts of appeals under Section 2239(b) to Commission actions taken following the completion of such proceedings. In fact, the structure of Section 2239 and the Atomic Energy Act as a whole suggests strongly that review of the denial of a petition filed under Section 2.206 be in the courts of appeals, like review of all other actions of the Commission not expressly conferred on the district courts.

Section 2239(a) reflects the incorporation in the Atomic Energy Act of a traditional regulatory scheme encompassing a number of types of proceedings. These include "proceedings" for (a) the granting, suspending, revoking, or amending of any license or construction permit; (b) the issuance or modification of rules or regulations dealing with the activities of licensees; and (c) the payment of compensation and award or royalty.

Because Section 2239(a) is so broad, the type of proceeding it requires is defined by the nature of the Commission action involved.[5] For example, a proceeding for the issuance of a license to possess special nuclear material, by-product material

[3] *Lorion* v. *U.S. Nuclear Regulatory Commission,* 712 F.2d 1472, 1478 (D.C. Cir. 1983) (citation omitted), *cert. granted,* 52 U.S.L.W. 3701 (1984).

[4] *Id.*

[5] *Siegel* v. *Atomic Energy Commission,* 400 F.2d 778, 785-86 (D.C. Cir. 1968).

or source material encompasses only informal notice and comment, whereas a proceeding for the issuance of a power reactor license has encompassed a trial-type hearing.[6] Similarly, a proceeding involving the issuance or modification of rules and regulations governing the activities of licensees (including power reactor licensees) encompasses only informal notice and comment,[7] although the Commission has on occasion used more elaborate procedures.[8] Lastly, the Commission may, through the issuance of rules and regulations, impose requirements on power reactor licensees on a generic basis, rather than offering the opportunity for a trial-type hearing on every license effectively so amended.[9] All of these proceedings lead to final agency action which is reviewable in the courts of appeals under Section 2239(b).

Even when persons affected by Commission action are entitled in a proceeding to demand a trial-type hearing, their request will not always be granted. Thus, the fact that a "proceeding" within the meaning of Section 2239(a) may have commenced does not mean that a trial-type hearing will necessarily take place. 10 C.F.R. § 2.714(b) requires that unless a person seeking a trial-type hearing establishes at least one contention with basis and specificity, his hearing request can be denied.[10] Additionally, 10 C.F.R. § 2.749 provides for the granting of summary disposition in all but mandatory construction permit proceedings [11] without evidentiary hearings if there are no material facts in dispute, even though a hearing would otherwise be held. Finally, the Commission has the substantive discretion to decide the issues to be addressed in a

[6] *City of West Chicago, Illinois* v. *U.S. Nuclear Regulatory Commission,* 701 F.2d 632, 641-45 (7th Cir. 1983).

[7] *Connecticut Light & Power Co.* v. *Nuclear Regulatory Commission,* 673 F.2d 525 (D.C. Cir.), *cert. denied,* 51 U.S.L.W. 3254 (1982).

[8] *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 542 n. 17 (1978).

[9] *See* Section 187 of the Atomic Energy Act, 42 U.S.C. § 2237, and *Union of Concerned Scientists* v. *Nuclear Regulatory Commission,* 711 F.2d 370, 380 (D.C. Cir. 1983).

[10] *BPI* v. *Atomic Energy Commission,* 502 F.2d 424 (D.C. Cir. 1974).

[11] 10 C.F.R. § 2.749(d).

trial-type hearing and thereby to exclude issues an interested party may wish to raise in a hearing. As a corollary, the Commission may deny persons the right to intervene in a trial-type hearing if they do not oppose the action NRC proposes to take.[12] Denials on these grounds of demands for trial-type hearings are reviewable in the courts of appeals.

The significance of this legislative and regulatory scheme is three-fold. First, it demonstrates that Congress intended for the Commission to fashion administrative procedures capable of satisfying its regulatory mission without having to seek specific Congressional approval. Thus, the Commission can take action either through informal notice and comment or through trial-type hearings, with features of either as the case may require. And, when it adopts the latter course, it may impose screening devices which limit the scope of the trial-type hearings to only specifically stated, relevant and material issues for which there is some basis. This flexibility is a hallmark of the Atomic Energy Act.[13]

Second, the overall structure of the Act indicates that Congress clearly preferred for the courts of appeals to review NRC licensing actions, regardless of the type of procedures used in taking those actions. This view is confirmed by provisions of the Act other than Section 2239(a), setting forth those matters arising under the Atomic Energy Act over which the district courts have jurisdiction. These provisions include Section 2280 (Injunctions); Section 2281 (Contempt Proceedings); and Section 2282 (Civil Monetary Penalties for Violations of Licensing Requirements). None of these matters involves the review of actions involving initial licensing, license suspension or revocation, license renewal, or license amendment taken by the Commission.

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[12] *Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983).

[13] When Congress enacted the Atomic Energy Act it adopted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving its statutory objectives." *Siegel* v. *Atomic Energy Commission, supra,* 400 F.2d at 783.

Third, by lodging judicial review of NRC actions relating to licenses in the courts of appeals and by providing the Commission with the administrative flexibility to shape its procedures to accommodate its regulatory mission, it is reasonable to assume that Congress would have expected the provisions in the Atomic Energy Act governing judicial review to be broadly construed in accordance with this regulatory scheme. Thus, if the Commission were to develop new procedures governing actions relating to licenses which, according to the Court of Appeals' reasoning, did not fit neatly into the literal language of Section 2239(a), but which were authorized under the Act, it would better carry out the intent of Congress to treat those procedures as falling within the general class of licensing proceedings enumerated in Section 2239(a) than to exclude them and require the Commission to seek either legislative clarification or accept district court review. There is no basis in the Act or its legislative history for requiring the Commission to return to Congress for clarification of the application of Section 2239(b) every time the Commission fashions such a new procedure. While Section 2239 in relevant part is unchanged since 1954, Section 2.206 was a new procedure adopted in 1974.[14] Contrary to the conclusion of the Court of Appeals, there is every reason here to indulge the well-founded presumption against bifurcation of review.[15]

Accordingly, the question raised by *Lorion* is what fundamentally distinguishes the denial of a petition filed under Section 2.206 from other comparable proceedings, the results of which are reviewable in the courts of appeals. *Lorion* posits two differences. First, it suggests that (a) unlike proceedings set forth in Section 2239(a), persons may not demand a hearing before their petition filed under Section 2.206 is denied and (b) unless and until such a demand can be made, a proceeding within the meaning of Section 2239(a) does not exist.[16] Second, *Lorion* implies that the district courts are better able to review the denial of a petition filed under Section 2.206 because such denials may not produce the type of formal record

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[14] 39 Fed. Reg. 12353 (1974).

[15] *See* note 4, *supra,* and accompanying text.

[16] *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1474.

which is usually the predicate for review in the courts of appeals.[17] Neither of these differences is meaningful when the denial of a petition filed under Section 2.206 is compared to other actions which are undeniably in the class of "proceedings" delineated in Section 2239(a).

First, it elevates form over substance to distinguish the denial of a petition filed pursuant to Section 2.206 from other proceedings of the type set forth in Section 2239(a) on the ground that in the former individuals may not demand a hearing prior to such agency action. If a petition filed under Section 2.206 is granted, an adjudicatory hearing may be commenced and the petitioner may become a party thereto.[18] Thus, the first step a petitioner under Section 2.206 must take to be granted a hearing is to convince the Commission that he has raised an issue of significance such that a hearing should be held. Should the petitioner be unable to do so, review is available in the courts of appeals, which possibly could lead to the remand of the proceedings to the NRC for a hearing.[19]

This treatment of a petition filed under Section 2.206 is not materially different from the treatment by the Commission of hearing requests in other proceedings of the type set forth in Section 2239(a). In such proceedings, an individual may be denied a hearing for failure to raise a valid contention within the scope of a proceeding or for failure to overcome a motion for summary disposition filed pursuant to 10 C.F.R. § 2.749. Just as the petitioner requesting a hearing in those cases may have his request denied in a proceeding under Section 2239(a), so may a petitioner under Section 2.206 have a petition denied and thereby lose his opportunity to have a hearing. In both instances, a "necessary first step" [20] would have been taken in a proceeding which could have culminated in a hearing and in

[17] *Id.* at 1476, quoting *Rockford League of Women Voters* v. *Nuclear Regulatory Commission*, 679 F.2d 1218, 1220-21 (7th Cir. 1982)

[18] 10 C.F.R. §§ 2.202, 2.206 and 2.714.

[19] *See* note 28, *infra.*

[20] *Natural Resources Defense Council, Inc.*, v. *U.S. Nuclear Regulatory Commission*, 606 F.2d 1261, 1265 (D.C. Cir. 1979).

both instances the party seeking to trigger such hearing would have failed to satisfy a condition precedent for its commencement.[21]

Accordingly, the denial of a petition filed under Section 2.206 is simply one of several devices used by the Commission to determine whether a hearing actually should be held. To conclude that such action is not a "proceeding" within the meaning of Section 2239(a) on the ground that the petitioner does not receive a formal hearing at that threshold stage is to elevate form over substance.

Lorion also suggests that the denial of a petition filed pursuant to Section 2.206 does not constitute a "proceeding" within the meaning of Section 2239(a) because the record generated by such agency action may be inadequate to permit meaningful review. The Court of Appeals assumed that the district court would be better able to reconstruct the record on which denial of the petition was based.[22]

This assumption does not support the conclusion that a denial of a petition filed under Section 2.206 is not a "proceeding" within the meaning of Section 2239(a), nor does it provide a basis for attributing an intention to Congress that it would prefer the district courts to review such denials.[23] When the

[21] When viewed in this light, a "proceeding" does not mean one thing for procedural purposes under Section 2239(a) and another for jurisdictional purposes under Section 2239(b), as the Court of Appeals reasoned. *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1478. Rather, a "proceeding" under Section 2239(a) is commenced with the filing of a petition pursuant to Section 2.206 which in turn could lead to a hearing. To the extent that *Porter County Chapter of the Izaak Walton League* v. *Nuclear Regulatory Commission,* 606 F.2d 1363 (D.C. Cir. 1979), and *Illinois* v. *Nuclear Regulatory Commission,* 591 F.2d 12 (7th Cir. 1979), can be construed to suggest otherwise, the "not a proceeding" rationale, but not the holdings, of those cases should be rejected.

[22] *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1476, citing *Rockford League of Women Voters* v. *Nuclear Regulatory Commission, supra.*

[23] In this regard, the Forum agrees with the observation by Florida Power & Light Company that because the administrative record provides an adequate basis for judicial review, district court fact-finding would be inappropriate. Petition for Writ of Certiorari on Behalf of FP&L at 12-13.

NRC Staff denies a petition filed under Section 2.206, it is required to advise the person of such action and state its reasons for doing so.[24] This process alone results (as it did here) in a record which is sufficiently developed to permit judicial review. Indeed, in this proceeding the reviewing court will have before it a record of 547 pages of materials along with the seven page decision of the Director of Nuclear Reactor Regulation explaining the reasons for the denial.[25]

Moreover, the Commission typically publishes a notice of receipt of petitions filed under Section 2.206 in the *Federal Register* so that public comments may be submitted.[26] This practice is no less elaborate than that followed by the NRC in notice and comment rulemaking or when it issues a special nuclear by-product, or source material license.[27] All of these are Commission actions which are "proceedings" within the meaning of Section 2239(a), and which, therefore, are reviewable in the courts of appeals.[28] Accordingly, the state of the record does not provide a basis for concluding that the review of Commission action denying a petition filed under Section 2.206 is lodged in the district courts.

At bottom, the Court of Appeals in *Lorion* relied upon an overly narrow and exclusionary construction of Section

[24] 10 C.F.R. § 2.206(b).

[25] Petition for Writ of Certiorari on Behalf of NRC at 5; *Florida Power & Light Co.* (Turkey Point Plant, Unit 4), DD-81-21, 14 NRC 1078 (1981).

[26] The Commission does not publish notices of receipt for those petitions which are obviously without merit. 42 Fed. Reg. 36239 (1977).

[27] *City of West Chicago, Illinois* v. *U.S. Nuclear Regulatory Commission, supra,* 701 F.2d at 641-45.

[28] In addition, "an appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record. In such a situation, an appellate court may always remand a case to the agency for further consideration." *Harrison* v. *PPG Industries, Inc.,* 446 U.S. 578, 594 (1980). This Court very recently concluded that the district court lacked jurisdiction to review Federal Communication Commission actions when the same conduct could be and was being reviewed in the court of appeals on denial of a rulemaking petition, and again suggested remand to the agency if the record was not adequate for review. *Federal Communications Commission* v. *ITT World Communications, Inc.,* 52 U.S.L.W. 4507, 4509 (1982).

2239(a). In doing so, it ignored the flexibility given to the Commission by Congress to fashion its own administrative process and the Congressional desire reflected in the structure of the Act as well as Section 2239(a) that review of all actions relating to licenses be in the courts of appeals. For this reason alone, the decision of the Court of Appeals should be reversed.

II. The Decision by the Court of Appeals Will Unnecessarily Prolong, Fragment and Complicate Judicial Review of A Number of NRC Proceedings

Numerous decisions of this and other courts have construed special review statutes to avoid bifurcated review and to obviate duplicate judicial review of agency action.[29] The Court of Appeals reached a contrary result in this case based on its unnecessarily constricted reading of Section 2239(a), and its observation that absent legislative history to the contrary, there is no reason to conclude that Congress "envisioned its jurisdictional grant in Section 2239(b) to extend beyond orders entered in formal hearings."[30] Because the decision by the Court of Appeals results in bifurcated and duplicative review of NRC licensing decisions, the Court of Appeals should have been unwilling, absent a clear expression of Congressional intent, to read the Act as creating such a "seemingly irrational bifurcated system."[31] Similarly, the Court of Appeals should not have so narrowly construed Section 2239(a) when the effect of doing so is to complicate needlessly the judicial review of licensing actions by the Commission.

Unless *Lorion* is reversed, there will be four layers of review available to the losing party whenever a petition filed pursuant to Section 2.206 is denied. First, the Commission itself may elect to review the decision in accordance with

[29] *E.g., Crown Simpson Pulp Co.* v. *Costle,* 445 U.S. 193 (1980); *Harrison* v. *PPG Industries, Inc., supra; Amusement and Musical Operators Ass'n.* v. *Copyright Royalty Tribunal,* 636 F.2d 531, 534, *cert. denied,* 450 U.S. 912 (1981); *Investment Co. Institute* v. *Board of Governors of Federal Reserve System,* 551 F.2d 1270, 1276 (D.C. Cir. 1977).

[30] *Lorion* v. *U.S. Nuclear Regulatory Commission, supra,* 712 F.2d at 1478.

[31] *Crown Simpson Pulp Co.* v. *Costle, supra,* 445 U.S. at 197.

Section 2.206(c)(1). Whether or not it does so, when the denial becomes final agency action, the petitioner would then be able to seek judicial review of the denial in the district courts, after which further review could be sought in the courts of appeals and the Supreme Court. Commenting on these successive layers of review, one court stated, "This is too much." [32]

In addition to duplicate layers of review, *Lorion* would result in fragmented review of Commission licensing decisions. First, if a petition filed under Section 2.206 were granted in part and denied in part, those aspects of the petition denied would, when final, be reviewed in the district courts. However, any Commission order resulting from the aspects of the petition granted would be entered in a "proceeding" within the construction of Section 2239(a) by the Court of Appeals,[33] and would, therefore, be reviewable in the courts of appeals.

Second, if there were an ongoing hearing regarding the issuance of an operating license for a power reactor and a petition were filed pursuant to Section 2.206 requesting that an already outstanding license for that facility [34] be suspended or revoked for reasons other than those being litigated in the hearing, judicial review of the issuance of such license would be split between the district courts and courts of appeals. To the extent that the Commission issued the license based on its resolution of matters addressed in the operating license hearings, its action would be reviewed in the courts of appeals. To the extent that the Commission did not suspend the underlying license (subsumed in the operating license as explained in the margin, n. 34, *supra*) based on its denial of the petition filed under Section 2.206, its action would be reviewed in the district courts.

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[32] *Rockford League of Women Voters* v. *U.S. Nuclear Regulatory Commission, supra,* 679 F.2d at 1221.

[33] *See* 10 C.F.R. §§ 2.206, 2.202 and 2.714.

[34] Such licenses could include a construction permit, a 10 C.F.R. Part 70 license permitting preoperational storage of unirradiated nuclear fuel, or a low power testing license, any of which would normally be subsumed in the operating license, when issued.

Finally, *Lorion* raises a variety of questions as to whether Commission actions analogous to the denial of a petition filed pursuant to 10 C.F.R. § 2.206 are reviewable in the district courts or courts of appeals. For example, 10 C.F.R. § 2.802(a) provides that any interested person may petition the Commission to issue, amend or rescind any regulation. 10 C.F.R. § 2.803 further provides

> No hearing will be held on the petition unless the Commission deems it advisable. If the Commission determines that sufficient reason exists, it will publish a notice of proposed rulemaking. In any other case, it will deny the petition and will notify the petitioner with a simple statement of the grounds of denial.

Under the reasoning of *Lorion,* such denial would appear to be reviewable only in the district courts because a rulemaking "proceeding" of the formal type contemplated by the Court of Appeals would not exist. The petitioner for rulemaking would not have been able to demand a "formal hearing" (in this case informal notice and comment), prior to the denial of his petition. Even though the Commission would have set forth a statement of the grounds for its denial, because a "proceeding" (in the *Lorion* sense) had not commenced, review of a denial of the petition would be lodged in the district courts. Thus, duplicative review of the denial of petitions for rulemaking could result from *Lorion,* even though the Act is structured such that the courts of appeals review final Commission actions issuing or modifying rules and regulations dealing with the activities of licensees.

Similarly, the Commission has the authority on its own to revoke, suspend or modify a license.[35] If it suspends a construction permit for a power reactor until specified corrective action is taken, it is possible that an interested member of the public would request that the Commission superimpose a further suspension and not reinstate the permit until additional actions are taken. If the Commission denies the request and review is sought, it is unclear from *Lorion* which federal courts would

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[35] 10 C.F.R. § 2.202.

have jurisdiction over the action. If the request to maintain a suspension in force and not to reinstate the license is viewed as a petition filed under Section 2.206, then reinstatement arguably would be reviewable in the district courts under *Lorion*. However, if reinstatement of the permit is viewed correctly, *i.e.*, as the end of an enforcement proceeding commenced under Section 2.202, then review of the Commission action would be appropriately had in the courts of appeals.

Accordingly, the decision by the Court of Appeals in *Lorion* unnecessarily prolongs, fragments and complicates judicial review of NRC licensing actions. In the absence of any evidence that Congress intended such a review procedure, the construction of Section 2239(a) by the Court of Appeals in *Lorion* should be rejected.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is incorrect and should be reversed.

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